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In The
Supreme Court of the United States
October Term, 1984

ALAN CHESLER AND SHEILA CHESLER,
Appellant,

vs.

STADLER ASSOCIATES, INC.,
Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED

1. WHETHER THE TRIAL COURT WAS CLEARLY ERRONEOUS IN FINDING THAT THE SELLING BROKER HAD NOT WAIVED ITS RIGHT TO 25% OF THE DEPOSIT.

2. WHETHER THE TRIAL COURT WAS CLEARLY ERRONEOUS IN FINDING THAT NO EVIDENCE OF A LISTING BROKER—SELLING BROKER AGENCY RELATIONSHIP WAS PRESENTED AT TRIAL.

Pursuant to Rule 28.1, the following are affiliates of STADLER ASSOCIATES, INC:

The Stadler Corporation

Stadler Properties, Inc.

South Florida Referral Services, Inc.

Stadler Real Estate School, Inc.

Stadler Mortgage Corporation

Stadler Insurance Agency, Inc.

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STATEMENT OF THE CASE

The underlying transaction in this case was the sale of real property. Sellers - ALAN and SHEILA CHESLER ("CHESLERS") had listed their house for sale with SOUTH DADE REALTY, INC. ("SOUTH DADE"). (T.3). STADLER ASSOCIATES, INC. ("STADLER") found a prospective purchaser for the CHESLERS' house. (T.3).

On February 24, 1980, the CHESLERS attended a meeting at the office of SOUTH DADE. (T.32). At this meeting, STADLER presented to the CHESLERS an all cash offer from EMPIRE CORPORATION ("EMPIRE") for the CHESLERS' house at the listing price of $535,000.00. (T.86). The CHESLERS were reluctant to accept EMPIRE'S offer because of doubts they had concerning EMPIRE'S ability to meet the financial requirements of the contract (T.87).

The last paragraph of the Purchase and Sale Agreement labelled "Fee to Broker" provided that in the event of EMPIRE'S default, EMPIRE forfeited its right to the deposit and the CHESLERS would receive 50% and brokers 50%. (R.10). SOUTH DADE, through sales associate JOAN GRADY volunteered to waive its right to the deposit to be made by EMPIRE should EMPIRE default in its performance. (T.109). ROSALIE ELLIOTT of STADLER did not agree to waive STADLER'S right to the deposit in the event of EMPIRE'S default. (T.109). ROSALIE ELLIOTT left the meeting after forty-five minutes. (T.86). MR. APPLESTEIN, friend of the CHESLERS and an investor, drafted a waiver of deposit agreement after ROSALIE ELLIOTT'S departure. (T.53).

JOAN GRADY signed the waiver agreement as agent for SOUTH DADE. (R.248). The CHESLERS then signed the Purchase and Sale Agreement. (T.22). EMPIRE placed a deposit of $51,700.00 with BANK OF FLORIDA as Escrow Agent. (T.8).

On June 30, 1980, EMPIRE filed suit in U.S. District Court for the Southern District of Florida against the CHESLERS, SOUTH DADE, STADLER and BANK OF FLORIDA. (R.1). EMPIRE alleged that the CHESLERS were in breach of the Purchase and Sale Contract. (R.1).

Defendants, SOUTH DADE and STADLER crossclaimed against Defendants/CHESLERS and Defendant/BANK OF FLORIDA for their 25% shares of the deposit. (R.204,215). EMPIRE'S Complaint was dismissed on April 14, 1982. (R.199).

A non-jury trial was held on the crossclaims of SOUTH DADE and STADLER on April 11, 1984. The trial court entered Final Judgment on June 27, 1984. (R.279-280). SOUTH DADE'S crossclaim was denied. STADLER was awarded 25% of the deposit, plus costs and attorneys fees. Defendant/CHESLERS filed a Notice of Appeal from the award to STADLER on July 16, 1984. (R.281).

The issue for review is whether the trial court clearly erred in its findings of facts that STADLER did not waive its right to the deposit, and that a STADLER-SOUTH DADE agency relationship was not presented at trial. The applicable standard of review is the clearly erroneous standard. Findings of fact shall not be set aside unless clearly erroneous. Fed. R. Civ. P. 52(a).

The court of appeals can overturn a trial court's fact finding only if it was left with the definite and firm conviction that such a finding was mistaken. *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457 (5th Cir. 1976).

SUMMARY OF THE ARGUMENT

Appellee's argument for the first issue is that the evidence of record substantiates the trial court's findings of fact. The trial judge had the opportunity to weigh the testimony of the witnesses and to evaluate all of the evidence presented before making his findings of fact. These findings of fact should not be set aside because Appellant has not met his burden of proof showing the findings to be clearly erroneous.

Appellee's argument for the second issue is that the Appellant is precluded from introducing on appeal, an issue that was not presented to the trial court. The trial judge specifically found that Appellant's issue was not presented to him. The facts of record do not support the argument by Appellant.

ARGUMENT

A. The Trial Court Was Not Clearly Erroneous In Finding That Stadler Did Not Waive Its Right To The Deposit.

In his findings of fact, Judge Eaton specifically found that STADLER, through its sales associate ROSALIE

ELLIOTT, did not waive its right to the deposit. (T.109). Appellant, nevertheless, argues that ROSALIE ELLIOTT'S silence at the February 24, 1980 meeting amounts to an acceptance of the waiver agreement.

Appellant's argument is faulty in two respects. First, in order for the court to find a waiver through silence, the court must also find that the trial judge sitting as fact finder was clearly erroneous in his finding that STADLER did not waive its contractual right to the deposit. The trial court had the opportunity to hear the testimony of all the witnesses. An appellate court may not consider evidence de novo, and must be particularly reluctant to disregard a finding based on evaluation of testimony drawing credibility into question. *Matter of Multiponics, Inc.*, 622 F.2d 709, 722-723 (5th Cir. 1980).

Based on the testimony presented, the trial judge found "the effort to establish a waiver through MISS ELLIOTT on the part of STADLER, meaning either that the lady joined in the written contract, the terms of it by oral agreement or reached some similar or other oral agreement to waive simply has not been established by the evidence." (T.109).

The trial court addressed ROSALIE ELLIOTT'S silence, but did not find her conduct amounting to an acceptance under the circumstances.

> COURT: I do not think that the other lady was doing anything but sitting there and observing this fiasco, you understand, as best I can arrive at it, so that there is no way that MR. TEW (CHESLERS attorney) had proved up any meeting of the minds or contractual agreement or joining in with this written contract. (T.107).

The trial judge then concluded that the CHESLERS had not met their burden of proving by a preponderance of the evidence that a contract between STADLER and CHESLER existed.

> COURT: I am talking about the people that were selling this property or trying to sell it have the burden of showing that contract by the preponderance of the evidence, and that is not even close in considering the weight of the testimony before us. (T.109).

The evidence amply supports the trial court's findings, and they should not be disturbed on appeal.

Second, Appellant argues that MISS ELLIOTT'S silence estops STADLER from asserting its right to the deposit or waives its right to the deposit. In support of this argument, Appellant cites two cases, *Richards v. Dodge*, 150 So.2d 477 (Fla. 2d D C A 1963) and *Arbogast v. Bryan*, 393 So.2d 606 (Fla. 4th D C A 1981). Both of these cases stand for the general rule than an estoppel may under certain circumstances be created by silence. To create an estoppel by silence, there must be some duty to speak and some detrimental reliance thereon. *Ennis v. Warm Mineral Springs, Inc.*, 203 So.2d 514 (Fla. 2d D.C.A. 1967), *cert. denied*, 210 So.2d 870. Mere silence or inaction in and of itself will not create an estoppel. *Southernmost Humane Society v. Key West*, 365 So.2d 402 (Fla. 3d D.C.A. 1978). Neither STADLER nor its employee were under any duty to speak at the February 24, 1980 meeting. The Appellant makes no argument that STADLER was under a duty to speak or that the CHESLERS detrimentally relied upon STADLER'S silence.

Arbogast and *Richards* provide no support for Appellant's argument. In *Richards* and in *Arbogast,* the "silences" which led to a waiver were lengthy in duration. In *Richards,* 150 So.2d at 482, a tenant was estopped from asserting a breach of covenant against his landlord because he was deemed to have waived his right by his three month silence. In *Arbogast,* 393 So.2d at 607, a real estate salesman was estopped from asserting that his employment contract was void as against public policy because he was silent for six years and reaped benefits from his silence.

The February 24, 1980 meeting lasted some four hours. (T.69). ROSALIE ELLIOTT left after forty-five minutes. Various aspects of the underlying real estate were discussed before her departure. The trial court specifically found that ROSALIE ELLIOTT did not participate in the conversation concerning waiver of deposit. (T.105). ROSALIE ELLIOTT'S silence was momentary. She did not have a duty to speak. There was no reliance detrimental or otherwise on ROSALIE ELLIOTT'S silence. The CHESLERS, if they relied on anything, relied on the advice of MR. APPLESTEIN, an investor and current husband of SHEILA CHESLER. He was present at the February 24, 1980 meeting (T.61), and authored the waiver agreement. (T.51).

Appellant's argument that STADLER waived its right to the deposit by ROSALIE ELLIOTT'S silence is insufficient on its face because neither duty to speak nor detrimental reliance are shown by the established facts.

B. The Trial Court Was Not Clearly Erroneous In Finding That No Evidence Of An Agency Relationship Between South Dade And Stadler Was Presented At Trial.

Appellant's second argument that SOUTH DADE was acting for STADLER is without support in the record. The trial court specifically stated that this issue had not been presented at trial.

> COURT: The only way in the world that STADLER REALTORS would not be entitled to this would be if in fact under the circumstances of the arrangement SOUTH DADE REALTY does in fact find itself in the position to waive for both parties. This *would require* considerable discussion about the trade, established practices in the trade, *all sorts of presentations which have not been presented, were not raised, not urged and not a part of this situation.* (T.108).

Appellant is precluded from presenting in this appeal the theory that SOUTH DADE was STADLER'S agent. A court of appeal will not consider issues raised for the first time on appeal. *Adams v. Askew,* 511 F.2d 700, 705 n.9 (5th Cir. 1975). A theory not presented to the trial court will not be entertained for the first time on appeal. *Hill York Corp. v. American International Franchises, Inc.,* 488 F.2d 680, 690 (5th Cir. 1971).

Even if this court were to consider Appellant's theory, the facts of record do not substantiate the argument. The fact that ROSALIE ELLIOTT of STADLER and JOAN GRADY of SOUTH DADE cooperated on the real estate transaction does not create an agency relationship.

Appellant asserts that the record shows that JOAN GRADY was put into a position by ROSALIE ELLIOTT of STADLER whereby the CHESLERS would believe

that MISS GRADY'S signature on the commission waiver agreement would also bind STADLER. Appellant, however, fails to state how ROSALIE ELLIOTT put JOAN GRADY in this position, fails to state how and why the CHESLERS believed this, and fails to cite to a particular page or portion of the record to support this statement.

ROSALIE ELLIOTT testified that she had objected to waiving her portion of the deposit (T.92,93,94), and that she left the meeting held at South Dade Realty before the waiver agreement had been drafted, (T.89,90) and was unaware of its existence until the trial. (T.90,99). There was no testimony of record by the CHESLERS indicating that they were under the belief that SOUTH DADE was acting as agent for STADLER.

In *Fidelity and Casualty Co. of New York v. D.N. Morrison Construction Co. of Virginia,* 156 So.2d 385, 387 (Fla. 1934), the court cites the general rule that agency by estoppel has three primary elements: (1) a representation by the principal; (2) reliance on the representation by a third person; and (3) a change of position by the third person, in reliance upon such representation. The *Fidelity* court goes on to state that it is essential to application of the general rule that the following two important facts be clearly established: (1) "That the principal hold the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority; and (2) that the persons dealing with the agent knew of the facts, and acting in good faith, had reason to believe that the agent possessed the necessary authority." *Fidelity* at 387.

Appellant states the general rule and asserts that "joint procurement and negotiation of the contract, the cooperative signature and agreement as to the real estate commission on the Purchase and Sale Contract, and the joint participation at the meeting on February 24, 1980" is sufficient evidence to create such agency.

The very case that Appellant relies upon is very specific in prescribing the evidence necessary to find such agency. Appellant has not shown, nor does the record show that STADLER held out SOUTH DADE as its agent to the public, nor does the record show that STADLER knowingly permitted SOUTH DADE to act as having such authority. ROSALIE ELLIOTT'S testimony indicated that she was unaware of JOAN GRADY of SOUTH DADE'S waiver until the trial. (T.90,99). ROSALIE ELLIOTT testified that she did not give JOAN GRADY the authority or permission to waive STADLER'S right to the deposit. (T.97). There was no evidence to the contrary presented and the trial court accepted MISS ELLIOTT'S testimony as competent evidence.

Joint participation in procurement and negotiation of the contract, and joint participation at the February 24, 1980 meeting would indicate the converse of what Appellant asserts; that is that SOUTH DADE was not acting as agent for STADLER but rather that each realty was acting on its own behalf.

The record fails to show a representation by STADLER that SOUTH DADE was its agent, fails to show that the CHESLERS relied on a representation, and fails to show a change in position by the CHESLERS in re-

liance on STADLER'S representation. The record does indicate, however, that the CHESLERS' change in position was in reliance on MR. APPLESTEIN'S advice and judgment, (T.106,52) and that he authored the waiver of deposit addendum to the sales contract. (T.51).

———o———

CONCLUSION

Petitioner has not shown that this decision of the United States Court of Appeals for the Eleventh Circuit is in conflict with a decision of another court of appeals. Petitioner has also not shown that the Eleventh Circuit departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by the trial court so as to warrant the exercise of this Court's jurisdiction.

WHEREFORE, Respondent respectfully requests that the Supreme Court of the United States deny the petition for certiorari.

Respectfully submitted,

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